

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Barrington Kirksville License LLC)	MB Docket No. 12-151
KTVO, Kirksville, Missouri (21251))	CSR-8648-S
)	
Petition for Waiver of Section 76.92(f) of)	
the Commission's Rules)	
)	

To Chief, Media Bureau:

OPPOSITION TO PETITION FOR SPECIAL RELIEF

Pursuant to Section 76.7(b)(1) of the rules and regulations of the Federal Communications Commission (“Commission”),¹ by and through its attorneys, Citizens Mutual Telephone Cooperative (“Citizens”) hereby opposes the above-captioned Petition for Special Relief (“Petition”) filed on May 31, 2012 by Barrington Kirksville License LLC (“Barrington”). Specifically, Citizens opposes Barrington’s request for a waiver of the significantly viewed exception to the network non-duplication rules so that station KTVO, Kirksville, Missouri (“KTVO”) may assert its network non-duplication rights against station KCCI, Des Moines, Iowa (“KCCI”) on cable and satellite systems serving the community of Bloomfield, Davis County, Iowa. For avoidance of doubt, Citizens opposes the requested waiver solely as it relates to carriage of KCCI’s duplicating network programming in the community of Bloomfield, Iowa.

Citizens is a multichannel video programming distributor (“MVPD”) that owns and operates a wireline digital video system serving the community of Bloomfield. Currently, Citizens’ system carries both the CBS-affiliated primary stream of KCCI and the CBS-affiliated

¹ 47 C.F.R. § 76.7(b)(1).

multicast stream of KTVO. If Barrington's request for waiver is granted, absent a clear delineation of the rights KTVO would then be entitled to enforce, Citizens may be required to delete significant portions of the KCCI signal, one of the most widely viewed commercial broadcast stations carried on its system.

As discussed herein, Barrington's request for waiver should be denied as contrary to the public interest because the deletion of network programming from the KCCI signal would result in significant public inconvenience, including a high degree of consumer confusion and dissatisfaction, as well as abrogate Citizens' bargained-for contractual rights. If the Petition is not denied, the Media Bureau should delineate the precise scope of any granted waiver. Specifically, the Bureau should explicitly state that a waiver of the significantly viewed exception set forth in Section 76.92(f),² in no way requires the deletion of network programming by video systems which qualify for the small system exception set forth in Section 76.95(a),³ which is the factual situation in the present case.

I. Background

Citizens is an independent telephone cooperative, serving the community of Bloomfield and surrounding rural areas in Southeast Iowa. As a member-owned cooperative, Citizens is committed to providing its subscribers with high quality, advanced communications services at the lowest practicable cost. Beginning in 2006, the cooperative made a significant capital investment in network upgrades, including the rollout of fiber-to-the-premises (FTTP) facilities capable of delivering "triple play" service bundles, including advanced voice, video and high-speed data communications services. In March, 2008, Citizens launched its Internet-protocol television (IPTV) service. The incorporated municipality of Bloomfield is by far the largest

² 47 C.F.R. § 76.92(f).

³ 47 C.F.R. § 76.95(a).

community served by Citizens' video system, comprising 2,640 residents and 1,122 households.⁴

Citizens has less than 500 subscribers in Bloomfield. Nevertheless, within the community of Bloomfield, Citizens' video service provides a competitive, local alternative to the incumbent cable provider and direct broadcast satellite services.

The channel lineup for Citizens' system currently includes the primary digital stream (standard definition and high definition, as available) of the following local commercial broadcast signals:

Station	Community of License	Channel Position	Network Affiliation
KTVO	Kirksville, MO	3-SD/600-HD	ABC
KDMI	Des Moines, IA	4-SD	MyNetwork
KCWI	Des Moines, IA	5-SD/374-HD	CW
KCCI	Des Moines, IA	8-SD/332-HD	CBS
WHO	Des Moines, IA	13-SD/342-HD	NBC
KYOU	Ottumwa, IA	15-SD/334-HD	FOX
KFPX	Des Moines, IA	10-SD	ION

In addition to these primary digital streams, the system carries digital multicast streams of the following local commercial broadcast signals:

Station	Community of License	Channel Position	Network Affiliation
KCCI	Des Moines, IA	2-SD	N/A
KTVO-DT2	Kirksville, MO	14-SD/335-HD	CBS
WHO	Des Moines, IA	343-SD	N/A

Since its initial rollout of service, Citizens has carried KTVO's ABC-affiliated primary digital stream and KCCI's CBS-affiliated primary digital stream. On information and belief, these same signals have been available to cable subscribers in Bloomfield for as long as any cable system has operated in the community. In January 2012, Citizens added KTVO's CBS-affiliated multicast stream to its system's channel lineup, in addition to carriage of the station's primary digital stream. Currently, the primary and multicast programming streams of KTVO and KCCI are retransmitted on the system pursuant to retransmission consent agreements

⁴ 2010 U.S. Census Data. See, http://www.recap.iastate.edu/local/2010census/files/2010census_1907030.pdf.

between Citizens and the respective station licensees. In exchange for these contractual retransmission rights, Citizens pays significant retransmission fees, which must be passed through to consumers in the form of increased rates for subscription video packages.

II. Opposition to Waiver

In its Petition, Barrington asserts that KCCI no longer receives a significant level of over-the-air viewership in the community of Bloomfield. In support of this assertion, KTVO has submitted the results of a community-specific Nielsen Station Index (NSI) survey conducted by Nielsen Media Research. The survey reports independently tabulated results from two four-week audience sweep periods in each of the years 2010 and 2011. For the community of Bloomfield, the survey includes a total of 6 in-tab sample households for the 2010 measurement periods and a total of 3 in-tab sample households for the 2011 measurement periods. Based on this diminutive sample of non-cable, non-ADS households, the estimated over-the-air audience share for KCCI in each period falls below the Commission's defined criteria for a "significantly viewed" network broadcast station.⁵

While conceding that the Commission has previously accepted the validity of community-specific Nielsen data with a relatively small number of in-tab samples in connection with prior waiver requests,⁶ Citizens urges the Commission to reconsider its approach in this case. A survey utilizing Nielsen data and statistical methodologies approved by the Commission under *KCST-TV, Inc.*⁷ and its progeny may be relevant in determining whether a distant station is in fact an over-the-air competitor of a petitioner. However, a very small survey (as few as three tabs in this case) should not, by itself, compel the deletion of programming from a distant station

⁵ 47 C.F.R. § 76.5(i).

⁶ See *Meredith Corporation*, Memorandum Opinion and Order, 22 FCC Rcd 12932 (rel. July 13, 2007); *KXAN, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 3307 (rel. Apr. 1, 2010), citing *Gulf-California Broadcast Co.*, Memorandum Opinion and Order, 23 FCC Rcd 7406 (rel. May 6, 2008).

⁷ *KCST-TV, Inc.*, Memorandum Opinion and Order, 103 FCC 2d 407 (rel. Jan. 27, 1986).

which has historically been significantly viewed over-the-air and made continuously available to cable and satellite subscribers in a given community. In light of public interest factors discussed below, the Commission should find that the NSI survey on which Barrington relies includes such an unreasonably small sample size as to lack statistical and legal significance in determining whether KCCI is in fact “significantly viewed” for purposes of Section 76.92(f).

In the absence of a more statistically meaningful survey or other persuasive evidence that KCCI is not in fact available over-the-air to viewers in Bloomfield, Barrington’s request for waiver should be denied as not in the public interest. This is necessary in order to appropriately balance competing interests, and in light of the evolving legal and economic realities concerning the retransmission of commercial broadcast stations.⁸ Further, while KCCI’s over-the-air viewership has no doubt declined since the conception of the 1972 Significantly Viewed List,⁹ the Commission has long recognized that the vast majority of households now view their programming through MVPDs, rather than over-the-air. In regards to subscriber satisfaction, Citizens’ system-specific viewing data¹⁰ markedly demonstrates that KCCI provides quality programming consistent with community needs and interests. Thus, the deletion of

⁸ Cf., *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011), at paras. 43-44 (noting commenter arguments that the exclusivity rules provide broadcasters with artificially inflated bargaining leverage in retransmission consent negotiations, and seeking further comments on whether eliminating these rules may help to minimize regulatory intrusion in the market, thus better enabling free market negotiations to set the terms for retransmission consent.).

⁹ See *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972), *aff’d sub nom. American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

¹⁰ See Attachment 1. Attachment 1 includes channel statistics for the CBS-affiliated KCCI primary digital stream (HD and SD) and the CBS-affiliated KTVO multicast stream (HD and SD), for the viewing periods of June 3 – June 9, 2012 and June 17 – June 23, 2012. These aggregate viewing measurements were generated at Citizens’ request by Citizens’ middleware provider. The two graphs showing “By Time” channel statistics reflect the number of set-top boxes (STBs) tuned to each station at specific times throughout each viewing day in the identified viewing period. The accompanying graphs showing “By Channel” channel statistics reflect the minimum, maximum and average viewership of each station for all viewing days included in the identified viewing period. As reflected in the graphs, KCCI consistently outperforms KTVO in attracting viewers, reflecting the station’s high degree of relevance to the actual needs and interests of the viewing public.

programming from KCCI's signal would result in significant public inconvenience, including a high degree of consumer confusion and dissatisfaction.

In addition to causing unwarranted inconvenience to consumers, the deletion of programming from KCCI's signal would also abrogate Citizens' properly bargained-for contractual rights. Based on KCCI's significantly viewed status and its popularity with viewers, Citizens negotiated and entered into a retransmission consent agreement with the station's licensee, Hearst-Argyle Television, Inc. ("Hearst-Argyle"). This agreement grants Citizens the contractual right to carry the primary and multicast streams of KCCI on the Bloomfield system. In exchange for these retransmission rights, Citizens pays significant retransmission fees to Hearst-Argyle. Since 2008, the retransmission fees paid by Citizens to carry all local and certain significantly viewed commercial broadcast stations has increased exponentially, contributing to rapid increases in Citizens total programming costs during that same time period. As a member-owned cooperative, these rate increases for broadcast programming are passed directly through to subscribers, who are increasingly aware of the cost associated with "free" over-the-air programming. Given that Citizens' subscribers ultimately bear the costs associated with carrying KCCI, it is in the public interest that the station's signal be provided to these consumers without interruptions, deletions or other alterations, all of which are also likely to cause considerable subscriber confusion and dissatisfaction.

For the reasons discussed herein, the public interest would not be served by granting Barrington's requested waiver of the significantly viewed exception. However, if such a waiver is granted so that KTVO may *assert* its network non-duplication rights against KCCI in the community of Bloomfield, then the Commission should explicitly state that KTVO may not *enforce* those rights against network programming carried on small systems within that

community. Under Section 76.95(a), cable systems serving fewer than 1,000 subscribers are exempt from the Commission's network non-duplication rules.¹¹ Here, Citizens has fewer than 500 video subscribers in the community of Bloomfield. While the inapplicability of the network non-duplication rules to such a small system is unequivocal as a matter of fact and law, an explicit statement from the Commission will help avert unnecessary expenses associated with potential future disputes or litigation.

III. Conclusion

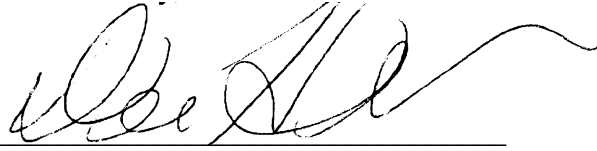
Barrington's request for waiver should be denied as contrary to the public interest because deletion of network programming from the KCCI signal would result in significant public inconvenience, including a high degree of consumer confusion and dissatisfaction. In addition, approval of the Petition would abrogate Citizens' contractual rights properly bargained for with the licensee of station KCCI. However, if the Petition is not denied, the Media Bureau should explicitly state that regardless of the significantly viewed status of station KCCI in Bloomfield, Citizens is not required to provide network-non-duplication protection to station KTVO in Bloomfield, due to the fact that Citizens qualifies for the small system exception set forth in Section 76.95(a), in that community.

¹¹ 76 C.F.R. 76.95(a). Cf., *In the Matter of KXAN, Inc.; Petition For Waiver of Sections 76.92(f) and 76.106(a) of the Commission's Rules*, 25 FCC Rcd 3307 (MB, 2010) at para.17, where the Media Bureau found that a distant station was no longer entitled to significantly viewed status in a particular community, but held that due to the operation of other Commission rules, the cable operator was nevertheless not required to enforce a network non-duplication request to delete the distant station's programming in that community.

Respectfully submitted,

CITIZENS MUTUAL TELEPHONE COOPERATIVE

By:

A handwritten signature in black ink, appearing to read 'Donald L. Herman, Jr.', written over a horizontal line.

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Its Attorneys


June 28, 2012

DECLARATION OF JOE SNYDER

I, Joe Snyder, declare as follows:

1. I am CEO of Citizens Mutual Telephone Cooperative, an Iowa cooperative association (FRN 0003733029).

2. I have read the foregoing Opposition to Petition for Special Relief, including the attachments filed simultaneously therewith, and to the best of my knowledge, information and belief, formed after reasonable inquiry, it is well-grounded in fact and is warranted by existing law and it is not interposed for any improper purpose.


Joe Snyder

6-27-12

Date

CERTIFICATE OF SERVICE

I, Ariel Patterson, a legal assistant at the law firm of Herman & Whiteaker, LLC, hereby certify that on this 28th day of June 2012, I caused copies of the foregoing *Opposition to Petition for Special Relief* to be served by first-class U.S. mail on the following:

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New York, NY 10019-3789

KGAN
KGAN Licensee, LLC
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Pittman LLP
2300 N Street, N.W.
Washington, DC 20037

KGAN License, LLC
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Cedar Rapids, IA 52406

KCRG
Cedar Rapids Television Company
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Cedar Rapids, IA 52401

KCRG
Cedar Rapids Telephone Company
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Cedar Rapids, IA 52401

KYOU
KYOU License Subsidiary, LLC
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Burlington Television Acquisition
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Iowa Public Broadcasting Board
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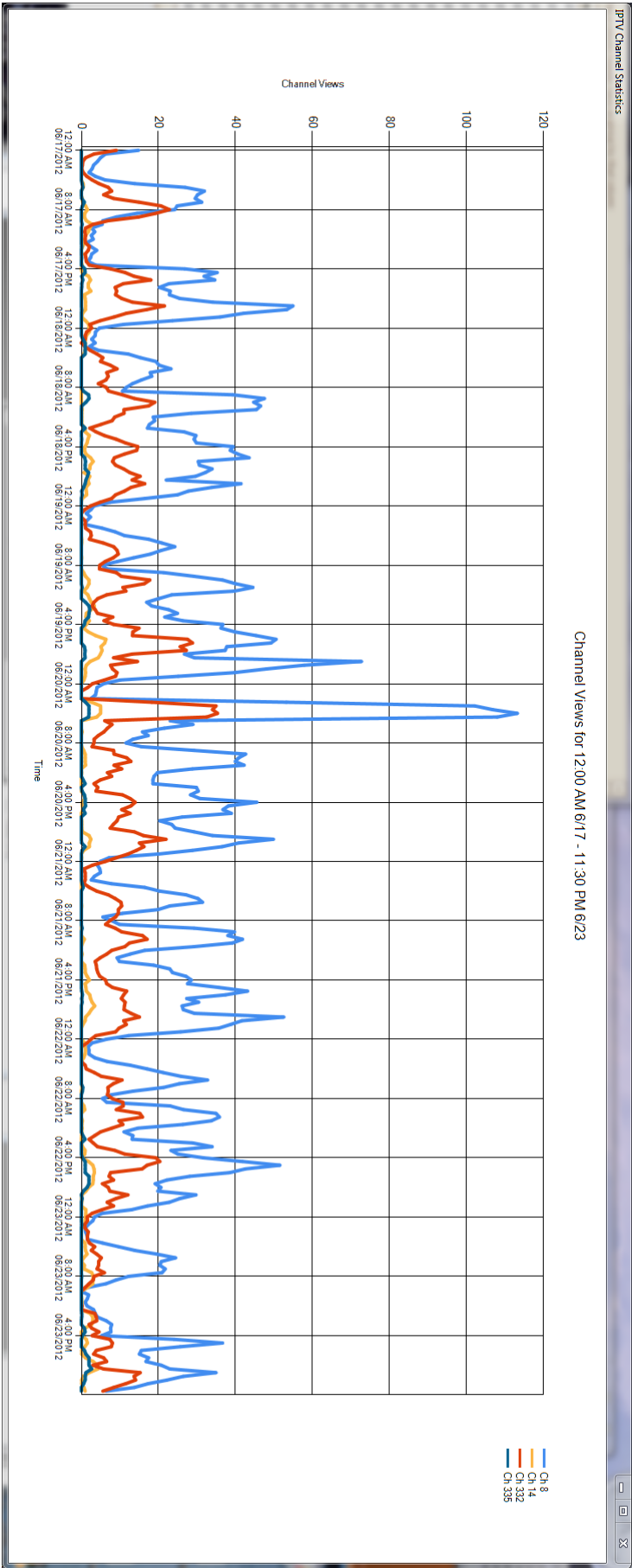
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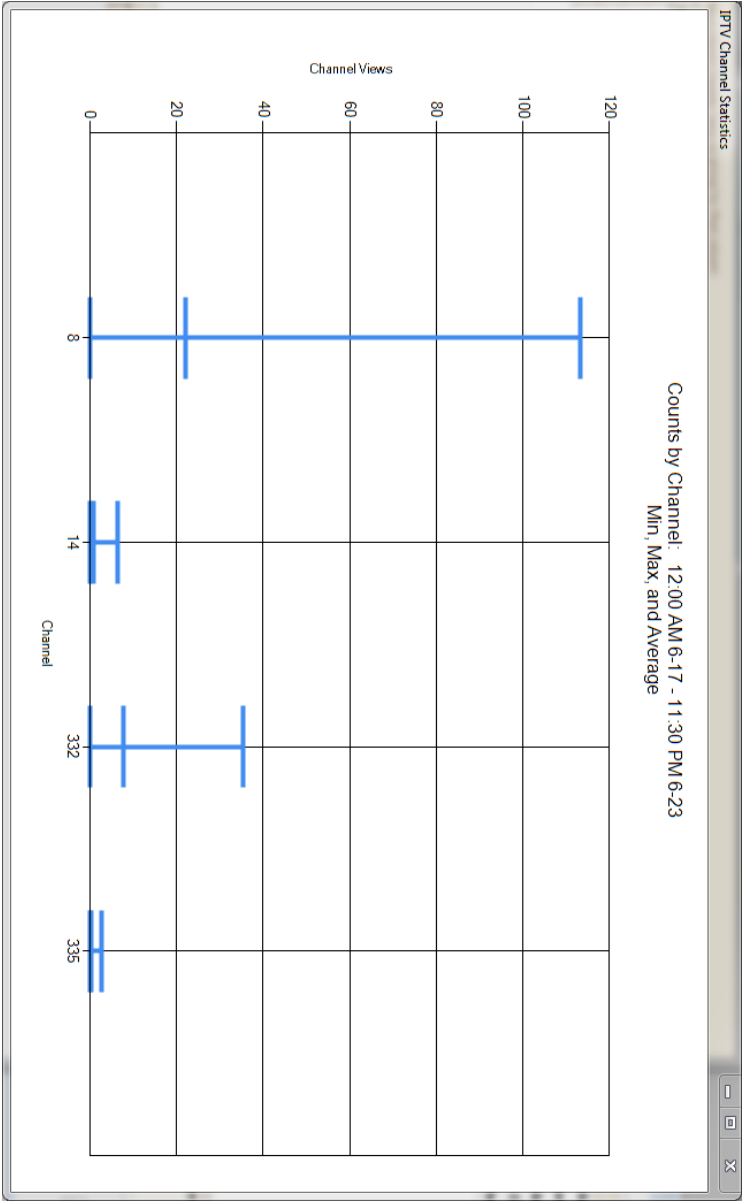
Ariel Patterson

EXHIBITS

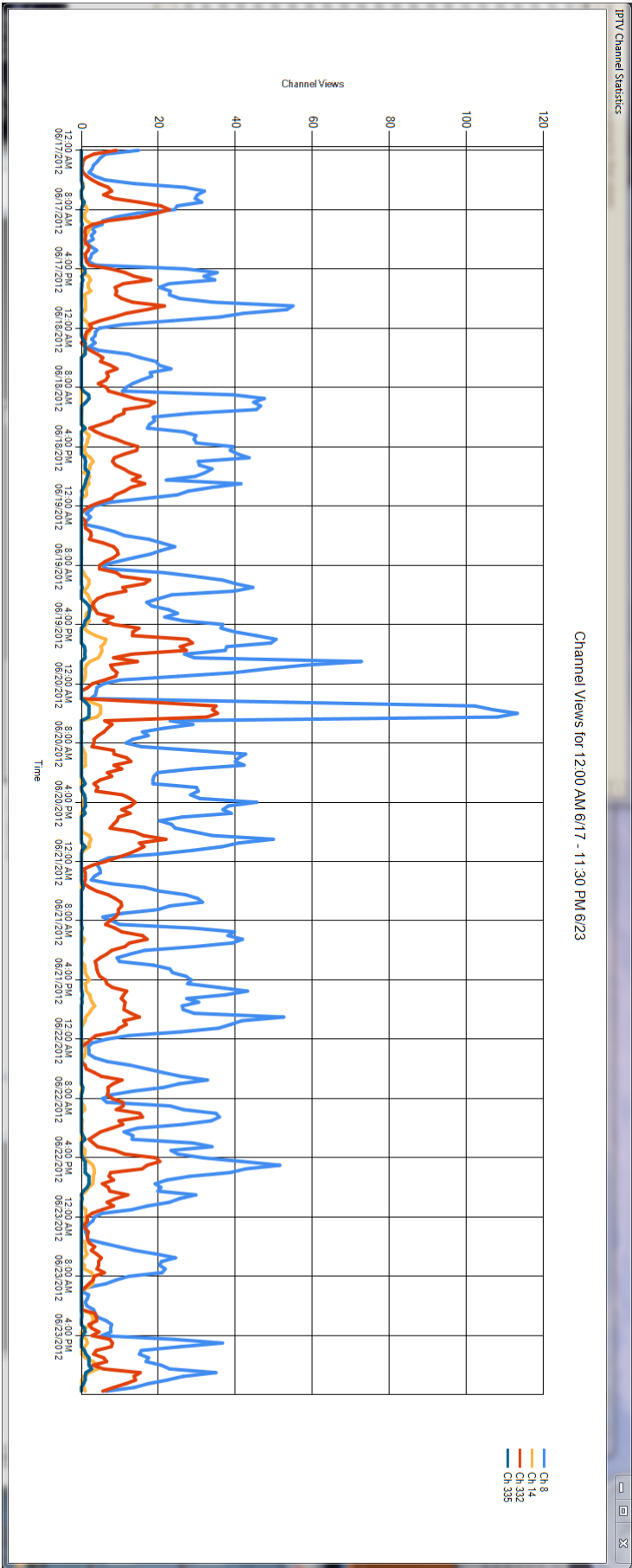
Graph of the “By Time” Channel Statistics



Graph of the "By Channel" Channel Statistics



Graph of the “By Time” Channel Statistics



Channel 8 KCCI CBS Standard Definition

Channel 14 KTVO CBS Standard Definition

Channel 332 KCCI CBS High Definition

Channel 335 KTVO CBS High Definition

Graph of the "By Channel" Channel Statistics

